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No. 07-(1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL SEGAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an independent insurance broker "engaged in the business of insurance" as that term is used in 18 U.S.C. § 1033(b)?

2. What role, if any, does state law play in determining if there has been a deprivation of "honest services" under 18 U.S.C. § 1346?

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INTRODUCTION

The case against Michael Segal represents a sweeping expansion of federal law into an area that has been traditionally regulated by the States. The prosecutors made a federal case out of Segal's violations of State insurance law. This occurred even though Segal had, well prior to the start of federal proceedings, voluntarily reported his violations to State authorities and with their blessing, was implementing a State approved remediation plan. Despite the fact that every customer received the insurance it wanted and every carrier was timely paid in full, Segal was charged with violations of federal law for deprivation of "honest services" and insurance fraud.

When Segal was convicted, the penalties he paid for his State law violations were dramatically greater than those specified in the State law. Segal was sentenced to a decade in prison and his business interests, which were essentially legitimate, were destroyed by forfeiture. The aggregate market value of those interests was several hundred million dollars.

If this Court does not correct the errors made by the courts below, over 3,000,000 independent insurance brokers in the United States will have real cause for concern. What happened to Segal could happen to them.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 495 F.3d 826 and is included in the Appendix as pages 1a-23a. The opinion of the United States District Court for the Northern District of Illinois (Castillo, J.) is reported at 2004 WL 2931331 (N.D. Ill.) and is included as pages 25a-45a in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 2007. Petitioner filed a timely petition for rehearing en banc and respondent filed a petition for rehearing. These petitions were denied on December 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1012(b):

> "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted

by any State for the purpose of regulating the business of insurance. . . . , unless such Act specifically related to the business of insurance. . . ."

18 U.S.C. § 1033(b):

"Whoever—

(A) acting as, or being an officer, director, agent, or employee of, and person engaged in the business of insurance whose activities affect interstate commerce, or

(B) is engaged in the business of insurance whose activities affect interstate commerce it is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs or such a business,

willfully embezzles, abstracts, purloins, or misappropriates any of the moneys, funds, premiums, credits, or other property of such person so engaged shall be punished as provided in paragraph (2).

18 U.S.C. § 1033(f)(1)(2):

(1) "the term "business of insurance" means—

(A) the writing of insurance, or

(B) the reinsuring of risks,

By an insurer, including all acts necessary or incindental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons;

(2) the term "insurer' means any entity the business activity of which is the writing of insur-

ance or the reinsuring of risks, and included any person who acts as, or is, an officer, director, agent, or employee of that business."

18 U.S.C. § 1346:

"For the purposes of this chapter [18 USCS §§ 1341 et seq.], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services,"

215 ILCS § 5/500-115(a):

"Any money that an insurance producer, limited line producer, temporary insurance producer, business entity, or surplus line producer receives for soliciting, negotiating, effecting, procuring, renewing, continuing, or binding policies of insurance shall be held in a fiduciary capacity and shall not be misappropriated, converted, or improperly withheld. An insurance company that delivers to any insurance producer in this State a policy or contract for insurance pursuant to the application or request of an insurance producer, authorizes the producer to collect or receive on its behalf payment of any premium that becomes due on the policy or contract not more than 90 days thereafter,"

50 ILCS § 313.40(a)-(j):

"a) All licensees required to maintain a PFTA, pursuant to subsection (c), shall establish and maintain a PFTA in a financial institution. All resident and quasi-resident licensees required to maintain a PFTA with one or more financial institutions located within the State of Illinois and subject to the jurisdiction of the Illinois

courts. Licensees are not required to maintain a separate PFTA or each insurer unless required by an (insurer(s).

b) All licensees required to maintain a PFTA, pursuant to subsection (c), shall certify at each license renewal or reinstatement date that premiums are held at PFTA. The account must be designated as a Premium Fund Trust Account on the bank records and those words shall be displayed on the face of the checks of that account.

c) A PFTA must be established and maintained if a licensee:

   1) Holds any premiums for 15 days or more before remitting to an insurer or other licensee.

   2) Deposits any collected premiums into a financial institution account or other account or uses the premiums, even though the premiums are remitted within 15 days.

d) The absence of the PFTA does not relieve the licensee of the obligation to hold the premiums shall not be used for purposes other that those authorized by the Part.

e) All licensees who maintain or are required to maintain a PFTA must deposit all premiums received into the PFTA.

f) Non-premium monies received by the licensee for soliciting, negotiating, effecting, procuring, renewing, continuing or binding policies of insurance may be deposited into the PFTA. Examples of non-premium monies are service

fees, policy fees, late charges, inspection fees and surplus fines.

g) All monies deposited into the PFTA are considered to be fiduciary funds until lawfully withdrawn.

h) The following disbursements may be lawfully withdrawn from the PFTA:

1) Net or gross premium remittances due other licensees or insurers. Claims payments or reinsurance premiums when offset at the direction of the insurer may be transferred to another account;

2) Return premiums due insureds;

3) Commissions due the licensee, net of any financial institution fees or service charges, or commissions due another licensee only when the commission withdrawl is matched and identified with premiums previously deposited into the PFTA;

4) Non-premium monies when matched and identified with prior non-premium PFTA deposits;

5) Interest or other revenue which the licensee is authorized to retain;

6) Withdrawals pursuant to subsections (h)(3), (4) and (5) must be made payable to the licensee or another licensee.

i) The PFTA shall not be used as a general operating account or claim payment account.

j) The PFTA balance in the financial institution shall at all times be the amount deposited less lawful withdrawals. If the balance in the

financial institution is less than the amount deposited less lawful withdrawals, the licensee shall be deemed to have misappropriated fiduciary funds and to have acted in a financially irresponsible manner.

STATEMENT OF THE CASE

When Segal was arrested in January 2002, he was nearly 60 years old, a prominent member of Chicago's business community, and a man with no idea whatsoever that he had violated any criminal law. He certainly had no inkling that his business interests would one day be labeled a criminal enterprise. At the time of his arrest, Segal was the sole owner and CEO of the Near North National Group (NNNG). Through NNNG, Segal owned several independent insurance brokerages, a fire-extinguisher company, an insurance software company, a finance company, a half interest in a venture that provided completion bonds to the film industry, and a title insurance company.

Near North Insurance Brokerage Inc. (NNIB) was the flagship of the independent brokerage firms owned by NNNG. NNIB operated under a broker's license issued to Segal. NNIB, based in Chicago, had grown organically to become the fifth largest independent broker in the nation. Its employees, which numbered between 60 and 80 in the mid-1980s, had grown to almost 900 by 2002. By then, NNIB enjoyed annual revenue in excess of $100 million and a fair market value of at least $150 million. In its 40 year history, NNIB never was the subject of a regulatory complaint or administrative proceeding.

Following his arrest, Segal was indicted and the charges against him mounted with each superseding

indictment. The final indictment charged Segal with mail and wire fraud, embezzlement, conspiracy to defraud the government (a tax conspiracy), and racketeering. The racketeering enterprise was an association of NNNG, NNIB and 21 other NNNG subsidiaries and affiliates.

The centerpiece of the case against Segal was the notion that Segal had misappropriated millions from an account called a premium fund trust account (PFTA). A PFTA is not a common trust or, escrow account, but is instead, a statutory creature. There is no federal, PFTA or its equivalent

Each State determines for itself whether or not insurance premiums must be deposited and held in a special account. Illinois is one of only 24 states that require brokers to deposit premiums in an account such as a PFTA. In other words, the federal charges against Segal—predicated as they were upon supposed violations of State law—could not have been brought in 26 of the 50 States.

Illinois law states that collected premiums must be deposited into a PFTA. Those premiums are held in a "fiduciary capacity" until they are lawfully withdrawn. 215 ILCS § 5/500-115(a). Lawful withdrawals can be made for five reasons, one of which is payment to an insurance carrier. 50 ILCS § 3113.40(h). Another is payment of commissions earned by the broker. Prior approval is not required for any withdrawal.

Premium money does not have to be segregated by customer or carrier. And, non-premium money can be deposited into a PFTA and commingled with premium money. Regardless of source, Segal deposited all funds into the PFTA. Although detailed records

must be kept, there is no requirement for periodic disclosures, reports or accountings.

Segal's trial started in April 2004. Although misappropriation was the leitmotif of the charges against Segal, the government never used the statutory definition of misappropriation. There is a misappropriation only if the PFTA balance is less than the amount deposited less lawful withdrawals. 50 ILCS § 3113.40(j). The government ignored the statutory definition and used instead the classic formula for working capital; cash plus accounts receivable compared to accounts payable. The government may have shown there was a working capital deficit; it never even tried to show there was a statutory misappropriation.

Approximately nine weeks after it was selected, the jury received its instructions. Fifteen pages of its jury instructions were devoted to a description of the Illinois insurance regulations, setting forth not only the duties of an insurance broker to maintain a premium trust fund account but also regulations imposing many other duties. The district court told the jury to convict if the government established any part of the alleged fraudalent scheme—for example, that Segal had sold insurance at a discount in violation of state law.

The district court did tell the jury that Segal was not charged with State crimes and that to convict him of federal crimes it was not enough to find that he violated State law. The only elements of "honest services" fraud the jury was required to find in addition to the violation of the State law, was the use of the mails and personal gain.

On June 21, the jury returned a guilty verdict. The next day, the jury returned its forfeiture verdict. The forfeiture verdict required Segal to forfeit $30 million and 60% of his interest in the racketeering enterprise.

On July 1, 2004, the district court, in the absence of Segal, entered a preliminary forfeiture order. Nobody seemed to remember that Segal's bond had been revoked on June 22, 2004 and he had been immediately incarcerated. Incarcerated he has been ever since.

On November 30, 2005, nearly seventeen months after the jury returned its verdict, Segal was sentenced. At sentencing, the district court found that $1,150,000 was the total loss caused by all of Segal's misdeeds. Not one penny of that loss came from the alleged misuse of the PFTA. According to the district court, no customer and no insurance carrier suffered any loss as a result of Segal's supposed misuse of the premium account. Furthermore, the pre-sentence report found, and the district court agreed, that Segal had not acted with any fraudulent intent insofar as the PFTA was concerned.

The district court sentenced Segal to concurrent prison terms of 60 months and 121 months. The court also entered a restitution order and a forfeiture judgment in the amount of $30,000,000. Previously, the district court granted Segal's motion for a judgment of acquittal as to his § 1033(a) convictions. That motion was granted because Segal did not make any false statements in connection with any financial reports or documents presented to the Illinois Department of Insurance.

On December 12, 2005, Segal filed a timely notice of appeal. On August 2, 2007, the Court of Appeals for the Seventh Circuit affirmed Segal's convictions and the restitution order. The Seventh Circuit did, however, vacate the judgment of forfeiture and remand the case for a determination of what portion of the $30 million in proceeds was not reinvested in the enterprise, but rather went to benefit Segal personally. The district court has yet to decide how it will resolve the issue of personal benefit.

REASONS FOR GRANTING THE PETITION

First, the holding by the Seventh Circuit of Appeals that an independent insurance broker is "engaged in the business of insurance" for purposes of 18 U.S.C. § 1033(b) has far reaching consequences for the insurance industry. That holding, without any elaboration of what specific facts compelled it, is contrary to established state law and accepted agency principles. There are 3,000,000 independent brokers in the United States. As a matter of fair notice to them, this Court should speak to the reach of § 1033(b) insofar as independent brokers are concerned.

Second, what bearing, if any, a violation of State law has on a defendant's guilt for deprivation of "honest services" mail fraud has generated substantial confusion. The en banc decision of the Second Circuit in *United States v. Rybicki*, 354 F.3d 124 (2003) adopts a uniform standard while the en banc decision of the Fifth Circuit in the *United States v. Brumley*, 116 F.3d 728 (1997), takes just the opposite position. The Seventh Circuit's decision in this case has only added to the confusion. The time is ripe for this Court to clear the air.

ARGUMENT

I. This Court should make it clear that an independent insurance broker is not "engaged in the business of insurance" as that term is used in § 1033(b).

The jury convicted Segal of violating 18 U.S.C, § 1033(b). Segal contended at trial and on appeal that such convictions could not stand, because he was not engaged in the "business of insurance" as that term is defined in 18 U.S.C. § 1033(f)(1). Without specifying what evidence it had in mind, the Court of Appeals said there was sufficient evidence to support a finding that Segal was engaged in the "business of insurance." This conclusion is erroneous.

Segal was not engaged in the "business of insurance," as that term is defined in 18 U.S.C. § 1033(f)(1). Segal neither wrote insurance nor reinsured risks. He was not an officer, director, or employee of an entity that wrote insurance or reinsured risks.

The only word left in § 1033 that might describe Segal is the word "agent." The district court wrote that Segal and NNIB "as brokers were agents of the insurance carriers." That statement is clearly wrong. In Illinois, generally an insurance agent acts as an agent of the insurer, while an insurance broker acts as an agent of the insured. *Griffin v. Universal Cas. Co.*, 654 N.E.2d 694, 701 (Ill. App. 1995). See also *Zanni v. Reliance Ins. Co. Inc.*, 590 N.E.2d 457, 462-63 (Ill. 1992) (insurance law . . . clearly distinguishes between an agent and a broker . . ."); *Roby v. Decatur Steel Erectors, Inc.*, 375 N.E.2d 1355, 1359 (Ill. App. 1978) ("in insurance law it is generally accepted that an agent is one who represents a particular insurer,

and a broker is one who represents an insured in the placing of insurance. . . .").

The Court of Appeals did not bless the district courts statement that a broker is an agent of the insurance carrier. The appellate panel recognized that a broker typically represents the insured but went on to say that whether a "broker is an agent of the insured or the uninsured is a question of fact" and a broker "may also become the agent of the insurer or both parties." Then, without referencing any facts, the panel concluded that Segal was engaged in the "business of insurance" as that term is defined in § 1033(f)(1). If agency *vel non* is a fact question, just what fact made Segal an agent of an insurer?

Segal did not have any fixed and permanent relationship with any insurance company. He solicited insurance businesses from the public and then placed that insurance with a company of his or his customer's choosing. He acted purely as a middle man between the insurer and his customer, the insured. Segal had no authority to bind any carrier. On every policy, Segal was required to secure the carrier's approval. Only after the carrier approved was the policy bound. Segal had no authority to set premium rates or settle claims on behalf of any insurer. Nothing in the record sets Segal apart from any other broker. The normal rule that a broker is the agent of the insured, not the insurer, should apply.

Congress recognized that the dangers that prompted § 1033 were posed by agents, not brokers. In 1990, a House subcommittee examined "four major insurance company failures" that, it concluded, had been caused by "fraudulent behaviors." It focused especially on the dangers posed by Managing General Agents who

"write business" on behalf of insurance companies and sometimes have the power to "underwrite business, obligate the company, handle claims, and even arrange for reinsuring the business written by the MGA in the company's name." *Failed Promises: Insurance Company Insolvencies*, A report by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Committee Print 101-P, pp.10-11, 10-31 (Feb. 1990). Four years later, the Judiciary Committee relied on this subcommittee report when it endorsed the legislation that includes § 1033. The Judiciary Committee declared, "[I]nsider insurance fraud is fast becoming the number one white collar crime in America today. . . [T]he Federal Government cannot simply sit by and watch another financial industry in this country be destroyed from within. "H.R. Rep. No. 103-468, 103d Cong., 2d Sess., p.2 (1994).

There is absolutely no evidence that Segal was an "insider" or in any position to inflict any harm from "within." Segal was the paradigmatic independent insurance broker. § 1033 (b), therefore, has no application to him or any other broker.

II. This Court should interpret 18 U.S.C. § 1346 so that the issue of what constitutes the deprivation of "honest services" is determined by a uniform national standard.

The lower courts' use of state law to define "honest services" mail fraud conflicts with this Court's decisions requiring a clear statement by Congress before state law is used to define a federal crime, e.g., *Jerome v. United States*, 318 U.S. 101 (1943), and with other decisions requiring a clear Congressional

statement before a federal stature is read to alter the federal—state balance in the prosecution of crime. E.g., *Cleveland v. United States*, 531 U.S. 12 (2000).

In *Jerome v. United States*, 318 U.S. 101 (1943), this Court Stated:

> [W]e must generally assume, in the absence of a plain indication of the Contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide. . . and at times on the fact that the federal program would be impaired if state law were to control. . . . When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. *Id.* at 104.

This court added "that when Congress has decided to incorporate State laws in other federal penal statues, it has done so by specific reference or adoption." *Id.* at 106.

Jerome held that courts should not look to state law to define the word "felony" as this word is used in the Bank Robbery act. Similarly, *United States v. Nardello*, 393 U.S. 286, 293-94 (1969), held that state law did not determine the meaning of the word "extortion" in the Travel act. And *Taylor v. United States*, 495 U.S. 575 (1990), held that state law did not determine the meaning of "burglary" in the enhanced punishment provision of a federal gun law.

The federal mail fraud statues proscribe not only fraudulent deprivations of the intangible right to "honest services" but also fraudulent deprivations of

property. In determining what qualifies as "property" this Court has not looked to state law but has instead adopted uniform national standards. For example, confidential information constitutes "property" throughout the United States, see *Carpenter v. United States*, 484 U.S. 19 (1987), and a license issued by a state regulatory agency does not. Federal courts should similarly determine the scope and meaning of "the intangible right to honest services" by articulating uniform national standards.

In *Cleveland*, this Court wrote:

> Equating the issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes criminal penalties for making false statements on license applications. As we reiterated last Term, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."

Id. at 24-25 (internal citations omitted)

Mail fraud is punishable by imprisonment for up to 20 years and, as this case demonstrates, serves as the predicate for RICO and its draconian penalties. Founding a defendant's guilt of these serious crimes on his violation of state law carrying much lighter penalties or no penalties stands federalism on its head. Every State's regulatory policy is a blend of prohibition, punishment, and forebearance. Using the mail fraud statute to federalize a State's substantive regulations without its accompanying pen-

alty structure and enforcement mechanisms does not advance the State's interests but frustrates them. By effectively constituting themselves Illinois Insurance commissioners in this case, federal prosecutors used a federal court to punish the violation of State regulations much more severely that a State legislature and State administrative authorities considered appropriate.

The appellate panel in this case did not claim that its position could be reconciled with this Court's many declarations that federal criminal laws should not be read to incorporate State standards unless Congress has clearly expressed a purpose to do so. Instead, it relied entirely on a single Seventh Circuit precedent. The panel said, "The argument that state law is always irrelevant in determining the scope of a fiduciary duty, the breach of which may give rise to a deprivation of honest services, is foreclosed by *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). *Bloom* makes clear that state laws are useful for defining the scope of fiduciary duties . . . " The panel then added, "Our conclusion is not altered by our decision in *United States v. Thompson*, 484 F. 3d 877 (7th Cir. 2007)."

Contrary to what the panel said, *Bloom* did not decide that "misuse of position" should be determined by looking to state law. Moreover, no party had agreed in *Bloom* that the term "honest services" should have uniform national meaning rather than vary with the laws of each State. That issue was neither presented nor resolved.

Thompson did not hold that Section 1346 should have a uniform national meaning, but its admonition against "turn[ing] state rules into federal crimes" pointed strongly in that direction. After excluding at

least some violations of State law from determination of "misuse of position," the Seventh Circuit observed that "[m]isuse of office' may be almost as slippery a phrase as 'honest services'" and that "[o]ne of these days we may need to gloss the phrase to reduce the risk that uncertainly poses to public servants." 484 F.3d at 883.

One of the concluding paragraphs of *Thompson* is especially instructive. There, Judge Easterbrook noted that limiting Section 1346 to cases in which public officials and private employees have received improper side payments (bribes and kickbacks) would be consistent with both the statue's history and its language. 484 F. 3d at 884. This limitation would specify both the kind of private gain needed to satisfy the statue and the kind of misuse of position required. It would limit the statue to wrongs of the sort that every state condemns. Under this interpretation, the federal mail frauds statute would have a uniform federal meaning.

Limiting Section 1346 to cases in which employees have received improper side payments would not only give the statue a uniform meaning. It would also give precision to the vague language of the statue. This interpretation would delimit the open-ended language of the statue without a process of case-by-case adjudication reminiscent of the development of common law crimes. Cf. *United States v. Brown*, 459 F.3d 509 (5th Cir 2006). This interpretation would be nearly identical to the one on the Second Circuit endorsed for "private sector" honest-services cases in *United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003) (en banc).

What hearing, if any, a violation of State law has on a defendant's guilt of "honest services" fraud has generated substantial confusion. The en banc decisions of the Second Circuit in *Rybicki* adopts a uniform standard while the en banc decisions of the Fifth Circuit in *United States v. Brumley*, 116 F3d 728, 734 (5th Cir. 1997), takes just the opposite position. The Seventh Circuit's decision in this case has only added to the confusion. The time is ripe for this Court to clear the air. The importance of clarifying the interaction between state law and federal is heightened here because this case involves the business of insurance and, therefore, implicates the McCarran-Ferguson Act.

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) states:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . , unless such Act specifically relates to the business of insurance. . . "

Section 1346 does not specifically relate to the business of insurance. Consequently, that statue cannot be applied in a way that would impair any Illinois law regulating the business of insurance. Because Congress used the word "impair" in Section 2(b), McCarran–Ferguson precludes application of a federal law if that application would frustrate a declared state policy or interfere with a state's administrative regime. *Humana Inc. v. Forsyth*, 525 U.S. 299, 310, 119 S. Ct. 710, 717 (1999). In this case, the application of Section 1346 frustrated Illinois' declared policy and interfered with its administrative regime. Illinois has a comprehensive Insurance Code and regulations that govern insurance brokers such as

Segal. Illinois' statutory and regulatory scheme sets standards of behavior for brokers and establishes specific sanctions for violations of such standards. By superimposing the federal fraud laws on Illinois legislative and regulatory scheme, the federal government set different standards of behavior and more severe sanctions than those envisioned by Illinois. This is not a case where the application of federal law merely duplicated state law. Here, the application of federal law frustrated and impaired state law. For example, the federal prosecutors prevented the implementation of state approved redemption plan which had been approved prior to Segal's arrest.

Finally, the existence of 18 U.S.C. § 1033 strongly indicates that Congress did not intend that Section 1346 would be used to regulate the business of insurance. In contrast to Section 1346, Section 1033 expressly relates to the business of insurance. When Congress wanted to make Insurance Fraud a federal matter it said so specifically. Section 1033 sets boundaries for the intrusion of federal fraud law into the business of insurance. The government's use of Section 1346 was beyond the pale.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 05-4601 & 05-4756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL SEGAL and NEAR NORTH
INSURANCE BROKERAGE, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 02 CR 112—Ruben Castillo, *Judge.*

ARGUED APRIL 12, 2007
DECIDED AUGUST 2, 2007

Before RIPPLE, EVANS, and SYKES, *Circuit Judges.*

EVANS, *Circuit Judge.* Michael Segal and Near North Insurance Brokerage (NNIB) were charged in 27 counts of a 28-count fourth superseding indictment: Segal with racketeering, mail and wire fraud, false statements, embezzlement, and conspiring to impede the Internal Revenue Service; NNIB with mail and wire fraud, false statements, and embezzlement. A jury returned guilty verdicts on all counts (except one which the government dismissed), but the

district court (Judge Ruben Castillo) granted a judgment of acquittal on 7, leaving a grand total of 19 standing at the end of the day. NNIB was ordered to pay a $1.4 million fine and pay restitution totaling $841,517.96. Segal was sentenced to 121 months imprisonment, ordered to pay $841,527.96 in restitution, and forfeit $30 million and his interest in the racketeering enterprise.

Segal was a licensed attorney, a CPA, and an insurance broker who began working for NNIB in 1964 when it was owned by George Dunne, a prominent politician and president, for 21 years, of the Cook County Board. By the early 1990s Segal was the owner and sole shareholder of the company. He then formed NNNB, a holding company, to be the corporate parent of NNIB and many of his other financial interests. During the 1990s NNIB was earning close to $50 million annually.

During the period covered by the indictment—1990-2002—Illinois law, as set out in 50 Ill. Admin. Code § 3113.40(a), required insurance brokers to maintain a premium fund trust account (PFTA) into which all premiums were to be deposited and held in a fiduciary capacity until the carriers demanded the premium payments. The time between a broker's receipt of premium payments and the carrier's demand—called the "float"—varied with the carrier. Commissions, interest, credit, and other nonpremium money could be withdrawn, but brokers were required to maintain PFTAs in trust with sufficient funds to pay premiums. The accounts could not be used as operating accounts. Failure to properly maintain a PFTA was grounds for suspension or revocation of a broker's license. Conversion of more than $150 was a felony.

NNIB maintained both a PFTA and an operating account, but everything was deposited in the PFTA, and the operating account was maintained with a zero balance. Funds were transferred to the operating account from the PFTA to pay expenses, but after those payments were made everything was transferred back to the PFTA. The chief financial officer of NNIB from 1990 to 1995, Norman Pater, considered this practice to be a violation of the regulations, as did his successor, Donald Kendeigh, and, in turn, his successor, Thomas McNichols.

Nevertheless, Segal expanded his business, purchasing brokerages in New York, California, Texas, and Florida. In addition, he purchased several other companies, ranging from a fire suppression device manufacturer to a software maker. The acquisition of these entities was funded by NNIB's PFTA. Most of the companies were losing money, so there were regular wire transfers from the PFTA to keep them solvent. By the end of 1989 the PFTA was over $7 million out of trust. At the end of 1995 it was $10 million short, and by August 2001 the deficit had grown to $30 million. Evidence shows that Segal knew he was converting PFTA money to fund expansion and for other unauthorized purposes. Auditors regularly told him so. Segal contended it was no big deal. He told McNichols that every insurance company operates the way he did. In the face of this sort of operation, the auditing firm McGladrey & Pullen resigned, as had an earlier firm, Deloitte & Touche.

The cash shortfall in the PFTA was so bad in January 2001 that Segal had the head of the NNIB branch in Los Angeles wire $3 million to cover payments which were due to carriers. Reluctantly he wired the

money on January 16; on the 22nd, $2.4 million was wired back to Los Angeles.

In April 2001, McNichols drafted a letter to Segal outlining an NNIB Management Operations Plan. Its purpose was to bring NNIB into compliance with the law. The plan proposed putting control of NNIB into an executive committee that would report to Segal but be free to act without his approval. The plan called for selling off money-losing affiliates, segregating PFTA from operating funds, and obtaining an outside audit. The letter noted that the PFTA was $17 million in deficit but that for years Segal had shown no interest in balancing it, that outside auditors had quit because of the deficit, that Segal's wife said Segal's ties to the governor would protect him, and that Segal was intentionally committing a felony. Segal rejected the plan. But he retained Hales & Company, financial consultants, to evaluate NNIB's prospects of raising capital by attracting new investors. Soon after Hales was retained, its chief executive officer received a phone call from Segal saying that an anonymous letter had been sent to the Illinois Department of Insurance (IDOI) reporting the PFTA deficit. The Hales vice-president in charge of the account concluded that the PFTA was out of trust by $24 million—even after Segal put $10 million from a mortgage on his home into the account. Hales secured loans for NNIB, and the situation was finally corrected when Firemen's Fund and AIG each loaned NNIB $10 million. The loans, however, came with restrictions on Segal's ability to dispose of assets, effectively taking control of NNIB out of his hands.

A less dramatic aspect of the situation involved petty cash. Dan Watkins, an employee in NNIB's accounting department, maintained a petty cash account of

$20,000. A ledger was kept with strict accounting of even small withdrawals for NNIB expenses. In contrast, every week, thousands were put in an envelope for Segal. Watkins eventually pled guilty to embezzlement for his part in the transactions.

NNIB often paid Segal's personal credit card bills—to the tune of $36,000 for the years 1999-2001. Employees of NNIB also performed personal services for him and his family. Evidence showed that between 1999 and 2001 Segal had $667,000 in unreported income for the value of services rendered.

In addition, Segal had employees make political contributions with personal checks. NNIB then reimbursed them. Segal also provided discounts on insurance premiums for political figures.

One influential person helpful to Segal was Nathaniel Shapo. Shapo's first job out of college was interning for Illinois' then-lieutenant governor, George Ryan. Shapo next worked for Ryan when Ryan was the Illinois secretary of state. After Shapo graduated from law school he worked on Ryan's gubernatorial campaign. Ryan was elected and appointed Shapo, who was then six months out of law school with no insurance background, as director of the Illinois Department of Insurance. Homer Ryan, the governor's son, introduced Segal to Shapo. When the previously mentioned anonymous tipster informed the IDOI of NNIB's PFTA deficit, IDOI began an investigation. Fortuitously for Segal, at that time he had a meeting scheduled with Shapo. Before the meeting, Governor Ryan called Shapo to say he hoped things would go well for NNIB, and after, called to ask how the meeting had gone. Shapo told Ryan that IDOI would not do an official examination of NNIB because it would kill a $20 million deal Segal had in the works.

Segal was also involved in providing insurance for the Chicago Transit Authority's reconstruction project on its Blue Line, a contract which NNIB was awarded. The contract was fee-based; no commissions were to be paid to the broker. However, before the contract was signed, Segal arranged to have one of NNIB's subsidiaries broker some of the coverages—and earn a commission of $370,000, an arrangement not revealed to the CTA.

Finally, in what seems—in the context of this case—to be almost a minor infraction, NNIB had a policy of writing off customer credits. After a credit owed to a customer had been carried on the books for a while without a payment demand, the credit was simply written off. Account executives were trained not to notify customers that they were owed credits. Segal personally approved of these write-offs, and in the judgment against him he was ordered to pay $471,000 in restitution to the victims.

Segal and NNIB have raised a number of issues on appeal. We begin with their claim that they were the targets of vindictive prosecution. They contend that additional charges were leveled against Segal and charges were brought against NNIB in retaliation for their pursuit of civil remedies against former NNIB executives who were cooperating with the government.

Before the present criminal case began, Segal and NNIB filed suit in state court against former NNIB executives Matt Walsh and Dana Berry, alleging that they violated noncompete clauses in their contracts with NNIB. After that—but not because of it—the government charged Segal with one count of fraud; at that time no charges were filed against NNIB. Then Segal and NNIB prepared a draft amended complaint

in their civil case and showed it to the prosecutors in the criminal case. The amendment alleged that Walsh and Berry illegally acquired proprietary information from a former NNIB information technologist, who had hacked into the company's computer system. When shown the amended complaint, the prosecutor protested that the allegations were not made in good faith and were intended to harass and intimidate Walsh and Berry, who were expected to be government witnesses. The prosecutor said that if the amended complaint was filed, the government would take it into account in deciding whether to bring charges against NNIB and to charge Segal under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 *et seq.* (RICO). The amended complaint was filed and the grand jury returned superseding indictments doing just that. Claiming that the additional charges were the result of vindictive prosecution, Segal and NNIB moved to dismiss the indictment. The district judge denied the motion without a hearing.

On a claim of vindictive prosecution, we review the district court's legal conclusions *de novo* and its findings of fact for clear error. *United States v. Falcon*, 347 F.3d 1000 (7th Cir. 2003); *United States v. Jarrett*, 447 F.3d 520 (7th Cir. 2006).

The Constitution prohibits initiating a prosecution based *solely* on vindictiveness. "[F]or an agent of the [United States] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights" is "a due process violation of the most basic sort . . . ." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Jarrett*, 447 F.3d at 525. After a trial, in very limited circumstances, courts have applied a burden-shifting presumption of vindictiveness where prose-

cutors have pursued enhanced charges after a defendant successfully challenged a conviction and was awarded a new trial. But we stated in *Jarrett* that our precedents do not provide for the application of such a presumption before trial. It remains a fact that a pretrial claim of vindictive prosecution is extraordinarily difficult to prove. To prevail on this sort of claim, *Jarrett* holds that a defendant must affirmatively show that the prosecutor was motivated by animus, "such as a personal stake in the outcome of the case or an attempt to seek self-vindication." *Id.* And it must be recognized, in reviewing a claim of vindictiveness before trial, that prosecutors have "wide discretion over whether, how, and when to bring a case." *Id.* As the Supreme Court has said, "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *United States v. Goodwin*, 457 U.S. 368, 382 (1982).

That the initial charges may not reflect the extent of a defendant's wrongdoing is clearly illustrated by the evidence in this case. It is hard to imagine that any prosecutor would fail to find NNIB a proper defendant or fail to conclude that Segal's wrongdoing extended far beyond one fraud count. The evidence supports the indictment, and Segal and NNIB have not made a showing of vindictiveness. What they point to in an attempt to support the claim is a statement by a prosecutor that if the defendants filed the amended complaint, that would be taken into account in deciding on RICO charges and charges against

NNIB. The prosecutor's statement was based, however, on the belief that the allegations in the amended civil complaint were not made in good faith but, to the contrary, were intended to harass and intimidate government witnesses. A prosecutor cannot be said to act vindictively by taking into account a defendant's perceived efforts to intimidate witnesses. In short, defendants have not made out a claim for vindictive prosecution, nor have they shown sufficient evidence to warrant a hearing on the claim.

Next, the defendants claim that there was a fatal variance between the indictment and the proof at trial. This claim fares no better. Specifically, they argue that the evidence showed multiple schemes to defraud rather than the single scheme charged in the indictment. We treat such a claim as an attack on the sufficiency of the evidence, and we review the evidence in the light most favorable to the government. *United States v. Olson*, 450 F.3d 655 (7th Cir. 2006).

Much summarized, the fourth superseding indictment charged the defendants with a single scheme to defraud and to obtain money and things of value from the PFTA (an account they were required to maintain for the benefit of customers and insurance carriers) by creating the false appearance that payments to NNIB would be held in trust for payment of premiums, that credits due customers would be refunded to them, and that the customers would receive honest services. Rather than a single scheme, defendants contend that evidence at trial revealed three separate schemes: failure to maintain sufficient funds in the PFTA; writing off of customer credits; and collection of a commission from the CTA contract for Blue Line renovation. The district court found that the evidence

was sufficient for the jury to find that the fraudulent acts were all part of a single scheme. We agree.

As part of their argument on this point, the defendants characterize the misuse of the PFTA account as improper borrowing which did not actually harm anyone or benefit them, certainly a benign interpretation of the facts. And the law is otherwise. The unauthorized use of money from an insurance premium trust account is mail fraud even if the defendant did not gain and the victim did not lose. *See United States v. Vincent*, 416 F.3d 593 (7th Cir. 2005). The claim that the carriers were at little risk ignores the facts which show that NNIB was often late in paying carriers and had to hold checks to carriers until it came up with sufficient funds to send them out. By 2001, NNIB had to obtain cash from affiliates to pay premiums and by the end of that year had to borrow $30 million to meet its obligations. In addition, it is hard to see how the defendants can contend that the credit write-offs were unrelated to the larger scheme. Withholding of credits directly deprived customers of money they were owed and of the honest services of their broker. In addition, it reduced the PFTA deficit, at least to some degree. Proceeds from other acts, such as the CTA fraud, were commingled in the PFTA and used for a variety of unauthorized purposes. Political contributions and premium discounts to influential people provided Segal with cover to prevent discovery of his financial shenanigans. In short, the evidence supports a finding of an overarching scheme involving the misuse of the PFTA account, as alleged in the superseding indictment.

We turn next to the claim that the jury instructions regarding mail and wire fraud were improper. The

defendants were convicted of fraud for depriving another of the "intangible right to honest services" pursuant to 18 U.S.C. § 1346. They contend that the jury instructions misstated the law and that there is a likelihood that the instructions confused the jury into thinking the defendants could be convicted for violations of Illinois insurance law. The defendants further contend that state law is always irrelevant under the statute. Alternatively, they say that if state law is relevant, it was overemphasized in the instructions. We review the instructions as a whole to determine whether they fairly treat the issues. *United States v. Murphy*, 469 F.3d 1130 (7th Cir. 2006).

The argument that state law is always irrelevant in determining the scope of a fiduciary duty, the breach of which may give rise to a deprivation of honest services, is foreclosed by *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). *Bloom* makes clear that state laws are useful for defining the scope of fiduciary duties, and that what distinguishes a mere violation of fiduciary duty from a federal fraud case is the misuse of one's position for private gain.

Our conclusion is not altered by our decision in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). Defendants argue that in *Thompson* we rejected the notion that simple violations of administrative rules provide the basis for a mail fraud conviction. In fact, what we said is that there is a "potential to turn violations of state rules into federal crimes," at which point we explained that our decision in *Bloom* specifically protects against that danger and remains the governing legal standard. The case against Thompson simply did not measure up.

Georgia Thompson was a state procurement officer who steered a travel contract to the low bidder (who

made legal campaign contributions to an incumbent governor) even though other people involved in the selection process rated a rival company more highly. The theory of the prosecution was that she deprived the state of her honest services—that is, her "duty to implement state law the way the administrative code laid it down . . . ." The private gain—the *Bloom* requirement—was a tiny salary increase of $1,000 per year and an alleged improvement in her job security for pleasing her superiors who allegedly favored the company she backed. We soundly rejected the government's theory. First, we found that Thompson already had job security as a civil servant. We then analyzed the case based on the assumption that she received the raise for steering the contract. Even using that assumption, we concluded that "a raise approved through normal civil-service means is not the sort of 'private gain' to which *Bloom* refers." *Thompson* does not change the *Bloom* rules, but merely reinforces them.

Furthermore, this case differs from *Thompson* in both degree and in kind. The difference in degree hardly bears mentioning—a $30 million fraud versus a $1,000 per year civil service raise. But, more importantly, it differs in kind. We concluded that Thompson did not act out of private gain, whereas Segal knowingly and intentionally misused the PFTA for his own very significant private gain. *Bloom* remains the law in this circuit and *Thompson* does nothing to change the result in our case today.

As to the instructions, the jury was told that the defendants were charged with violations of various federal laws, including the mail fraud, wire fraud, and racketeering laws. The instructions specifically state that the defendants "are not charged in this

case with any state crimes or any violations of state regulations." The jury was told that it "should consider the following provisions of Illinois law . . . in determining the existence, the scope and the nature of defendants' legal and fiduciary duties in this case." The instructions also state:

> To find defendants guilty of the charged federal offenses, it is not enough to find that one or both of the defendants violated Illinois law or the Illinois Insurance Regulations. Your job is to decide whether the government has proven beyond a reasonable doubt every element of each federal offense charged in the indictment based on the instructions I give you. Even if you believe that the defendants violated Illinois law or Illinois Insurance Regulations, you should return a verdict of not guilty if you also believe that the government has not proven every element of the particular charged federal offense you are considering beyond a reasonable doubt.

The defendants proposed an instruction, which was rejected, that the intent necessary to convict was the intent to defraud, not the intent to violate state law. Even though the defendants' specific proposed instruction was rejected, the jury was instructed that it had to find that the defendants acted knowingly and with intent to defraud. "Scheme to defraud" and "intent to defraud" were defined without any reference to state law. Viewed as a whole, we find the instructions fairly informed the jury that state law was to be used only to determine the nature of the defendants' legal and fiduciary duties.

Segal also contends that the jury was not properly instructed on the "pattern" element of the RICO charge. He does not claim that the instructions which

were given were erroneous or that the evidence was insufficient to prove a pattern. But he wanted an instruction that "a multiplicity of mailings or interstate communications may be no indication of the requisite pattern or racketeering activity because each mailing or wire communication was a separate offense and the number of offenses 'does not necessarily translate into a pattern of racketeering activity.'" We reject his argument. In this case there are years of false representations in various mail and wire communications. We have upheld convictions in similar circumstances. In *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003), we said that a jury could conclude that the false mailings in that case were integral to the scheme and that "because the scheme extended over several years, a jury also sensibly could find a pattern of racketeering."

In the final challenge to the convictions, defendants claim that their conviction of insurance fraud under 18 U.S.C. § 1033(b) cannot stand because NNIB was not "engaged in the business of insurance" as required by the statute. NNIB, defendants say, is an insurance broker, not an insurance provider.

The statute defined the "business of insurance" as the writing of insurance or reinsuring of risks "by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons[.]" § 1033(f)(1). "Insurer" means "any entity the business activity of which is the writing of insurance or the reinsuring of risks . . . ." § 1033(f)(2). We have previously said that under Illinois law, an insurance broker, or agent of the insured is:

> [o]ne who procures insurance and acts as middleman between the insured and the insurer, and solicits insurance business from the public under no employment from any special company, but, having secured an order, places the insurance with the company selected by the insured, or, in the absence of any selection by him, with the company selected by such broker.

American Ins. Corp. v. Sederes, 807 F.2d 1402, 1405 (7th Cir. 1986), quoting *Galiher v. Spates*, 262 N.E.2d 626, 628 (1970). Whether the broker is an agent of the insured or the insurer is a question of fact and "[a]lthough an insurance broker typically represents the insured, the broker may also become the agent of the insurer or both parties." *Capitol Indemnity Corp. v. Stewart Smith Intermediaries, Inc.*, 593 N.E.2d 872, 876 (Ill. App. 1992). Whether an entity is an agent of the company or the insured is determined by its actions. The evidence in this case is sufficient to support a finding that the defendants were engaged in the business of insurance as that term is broadly defined in the statute to include "all acts necessary to incidental to such writing or reinsuring." § 1033(f)(1).

We now turn to issues involving the forfeiture and restitution orders. Restitution was ordered against both Segal and NNIB in the amount of $841,527.96. They contend the evidence did not support $542,291[1] of that amount. The latter amount was attributable to credits—due to customers—which were written off. Of that amount, $357,079 was alleged to be owed but not paid to Waste Management. Segal presented an affidavit from Waste Management's risk manage-

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[1] The uncontested amount is the restitution ordered to be paid to the CTA for the illegal commission on the Blue Line project.

ment director saying that the sum was not owed to his company. But given other evidence, it was certainly possible that Waste Management didn't know it had credits coming.

We review the district court's calculation of restitution for abuse of discretion. *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Danford*, 435 F.3d 682 (7th Cir. 2006). We review the evidence in the light most favorable to the government. *Olson*, 450 F.3d 655 (7th Cir. 2006). The government is required to prove the entitlement to restitution by a preponderance of the evidence. In this case, the credits occurred in 1999, and the findings regarding the victims and the amounts they were owed were based on a report prepared by a government auditor and attached to the government's objections to the presentence report. NNIB CFO McNichols testified about a meeting with Segal in the fall of that year in which old, unclaimed credits were reviewed. Segal gave instructions to write them off. Another witness testified that if a client did not ask for the credit for a period of time, it was written off. Including these unpaid credits in the restitution order cannot be said to have been erroneous.

On the forfeiture issues, an initial matter involves Segal's claim that he was prejudiced by his absence from the hearing at which a preliminary forfeiture order was entered. We review the issue *de novo*, *United States v. Smith*, 31 F.3d 469 (7th Cir. 1994), to determine whether Segal's due process rights were violated. A defendant has a due process right to be present "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Mas-*

sachusetts, 291 U.S. 97 (1934)). But "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder*, 291 U.S. at 107-08. The determination is made in light of the record as a whole. *United States v. McCoy*, 8 F.3d 495 (7th Cir. 1993). In this case, the hearing resulted only in a preliminary order; the actual forfeiture was further litigated at a later time. Segal's counsel was at the hearing and no testimony was taken. When addressing this issue at a later proceeding, District Judge Castillo stated:

> I have taken a close look at that particular issue, and I've read the pleadings. The record I think is reflected in the pleadings that have been filed very ably and adequately by Mr. Segal's counsel that reflects that the preliminary forfeiture order was entered without him being here. That was an oversight. As I said at the point in time when the preliminary forfeiture order was entered, if we had all had our thinking caps on, that order should have been entered at the point in time immediately following the return of the verdict, but there was a lot of issues going on, not the least of which was whether or not Mr. Segal would be detained pending sentencing or not.
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> That being the case, the record will reflect that during the entire period from the point in time that preliminary forfeiture order was entered until Mr. Segal's attorneys filed their written objection, I think a period of 30 days, no issue was ever brought before this Court by way of any—not even one or two-paragraph motion saying Mr. Segal should have been present at the prelimi-

> nary forfeiture proceeding. It was never brought. And that the record will reflect.
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> The record will also reflect that it's this Court's conclusion that Mr. Segal has been more than adequately represented during that period of time and that extensive objections have been filed to the preliminary forfeiture proceeding.

So Judge Castillo concluded that if there was an error, it did not prejudice Segal. We agree with that conclusion. Furthermore, there were almost countless hearings regarding the forfeiture in this case, hearings at which Segal was present unless he voluntarily chose not to attend, as was the case on December 29, 2004. All in all, we are not convinced that Segal's due process rights were violated when the preliminary forfeiture was entered.

Segal also raises issues regarding the forfeitures themselves. 18 U.S.C. § 1963(a) provides that a person convicted of a RICO violation shall forfeit the enterprise "which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962" and "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection . . . ." The judgment against Segal required the forfeiture of both.

As to the enterprise, Segal contends that it was error for the court to set aside the jury verdict. The contention requires some explanation. The "enterprise" in this case was NNIB and related affiliates. Segal was the sole owner of the enterprise. The judge instructed the jury that Segal's interest in the enterprise was subject to forfeiture to the extent the enter-

prise was tainted by racketeering activity. The verdict form asked the jury to reply "yes" or "no" to the question whether Segal held an interest in the enterprise and, if so, what percentage of Segal's interests were tainted. The jury replied "yes" and answered the latter question 60 percent. However, the judge ordered forfeiture of 100 percent of the enterprise, thus the argument is that the "60 percent verdict" was set aside. The court noted that under § 1963(a), Segal's interest in the enterprise subjected 100 percent of the enterprise to forfeiture. That is a correct conclusion. The error was in submitting the percentage question to the jury in the first place. The error, however, had no bearing on the case. The fact is that the jury found that Segal had an interest in the enterprise. In fact, Segal owned the enterprise. The evidence at trial to that effect was not simply sufficient, but overwhelming. And § 1963 requires forfeiture of the enterprise.

Segal also objects to the forfeiture of $30 million in proceeds. He argues that there is a fatal variance between the allegations of the indictment and the theory of forfeiture employed at his trial. He also contends that the evidence is insufficient to support the amount of the forfeiture.

The indictment charges that Segal's interest subject to forfeiture is

> at least $20,000,000, including but not limited to all salary, bonuses, dividends, pension and profit sharing benefits received by defendant MICHAEL SEGAL, from NNIB and NNNG acquired and maintained during the period 1990 through 2001.

He says that the indictment must be interpreted to mean that only his executive salary of $120,000 per

year, the cash he took from petty cash, and the claims for personal expenses are subject to forfeiture. In addition, he says the government must show what proportion of his executive compensation consisted of racketeering proceeds. We cannot agree.

The items Segal mentions are, indeed, subject to forfeiture, but so is some of the money he stole from the PFTA. There is no requirement that proceeds be in the form of more-or-less legitimate salary payments or shady small reimbursements. While the indictment mentions salaries, bonuses, etc., it also says the forfeiture includes but is not limited to those items and that "at least" $20,000,000 is subject to forfeiture. In short, the indictment does not limit the forfeiture to the specific items it mentions or the ones Segal acknowledges. Assets forfeited as proceeds in *Genova*, a case on which Segal places considerable reliance, included clearly illegal bribes, as well as seemingly legitimate attorney fees. In fact, the defendant in *Genova* conceded that the bribes he received were subject to forfeiture. Here, the evidence is sufficient to show that money was stolen from the PFTA. It is also sufficient to show what the amount was. The evidence shows a deficit which grew over the years. At the end of 1989 the PFTA was over $7 million out of trust. At the end of 1995 it was $10 million short. Dennis Pogenburg of the Hales Groups testified that in the fall of 2001 the deficit was $24 million—*after* $10 million in borrowed money had been deposited into the fund. McNichol testified that at the end of April 2001 the PFTA deficit was $29 million. By the end of 2001, $30 million was borrowed to meet NNIB's premium obligations.

Segal makes much of the fact that our cases require that proceeds forfeitures be of net, not gross,

proceeds and that while restitution is loss based, forfeiture is gain based. He is correct about the legal principles, as *Genova* and *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991), make clear, but wrong about the application to his case. Here, the amount stolen is equal to the amount of the deficit. The gain is equal to the loss.

Furthermore, the $30 million is net, not gross, proceeds to Segal. It is true that to collect the funds which went (briefly) into the PFTA, NNIB had expenses—employee salaries, etc. But taking the money once it was there did not cause Segal to incur expenses. He does not say, for instance, that he paid someone to help him make off with the funds. The expenses involved in the acquisition of the $30 million were borne by NNIB; the defendant from whom the forfeiture is sought is Segal. To him, it was all net proceeds, figuratively, all gravy.

Again, *Genova* may provide a loose analogy. Jerome Genova was the mayor of Calumet City, Illinois. He appointed Lawrence Gulotta as city prosecutor and arranged for Gulotta's law firm to get most of the city's legal business. Gulotta kicked back to Genova about 30 percent of the payments the law firm received from the city. The kickbacks were a cost of doing business and, because we require forfeiture on net proceeds, were deducted from Gulotta's forfeiture of his fees. However, the kickbacks were net proceeds to Genova. In Segal's case, as well, the pilfered funds were net proceeds to him—if not to NNIB.

Segal also argues, though, that he paid the money back, and apparently for that reason he thinks the $30 million is not subject to forfeiture. We have trouble seeing why paying the money back means that he did not take it in the first place. More

importantly, he did not personally pay it back. He paid it back by borrowing from Firemen's Insurance and AIG in loans, primarily secured by assets of the company.

All of that said, what is not clear from the record is how much of the $30 million was poured back into the enterprise and how much went to benefit Segal personally. Without that information we cannot determine whether at least part of the $30 million forfeiture would constitute double billing, given that the amount that went back into the company will be forfeited through the forfeiture of the enterprise. Double billing, as the Court of Appeals for the Third Circuit has said, cannot be the intent of Congress:

> We do not believe that Congress intended forfeiture verdicts to double if property forfeitable under section 1963(a)(1) also happened to be forfeitable under section 1963(a)(2). To read the statute to permit such verdict doubling would introduce an arbitrariness into the statute that could not have been contemplated by Congress.

United States v. Ofchinick, 883 F.2d 1172, 1182 (3rd Cir. 1989). Accordingly, we will remand the case to the district court for a determination of what portion of the $30 million was not reinvested in the enterprise, but rather went to benefit Segal personally and is subject to forfeiture as proceeds of the illegal enterprise.

Finally, Segal argues that the forfeiture violates the Excessive Fines Clause of the Constitution. We review constitutional questions *de novo*. *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), the Court held that "a punitive forfeiture

violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." It is true that the forfeiture is large. It is only excessive, however, if it is disproportional to the offense. We cannot say that it was. This was a massive fraud. When a defendant commits a multimillion dollar crime, he can be required to forfeit assets also running into the millions.

For all these reasons, the judgment of forfeiture of the proceeds of the racketeering activity is VACATED and REMANDED for further proceedings in the district court. In all other respects, the judgments against Segal and NNIB are AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 05-4601 & 05-4756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICHAEL SEGAL and
NEAR NORTH INSURANCE BROKERAGE, INC.,
Defendants-Appellants.

December 18, 2007, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 CR 112. Ruben Castillo, Judge.

OPINION

JUDGES: Before Hon. KENNETH F. RIPPLE, *Circuit Judge*, Hon. TERENCE T. EVANS, *Circuit Judge*, Hon. DIANE S. SYKES, *Circuit Judge*.

AMENDED ORDER [1]

Our opinion in this case was issued on August 2, 2007. Michael Segal filed a petition for panel rehearing and a petition for rehearing en banc on August

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[1] Circuit Judges Flaum and Rovner did not participate in the case.

16, 2007. The government filed a petition for panel rehearing on October 15, 2007. Both motions for panel rehearing are DENIED. No judge has called for a vote on Mr. Segal's petition for rehearing en banc, so it also is DENIED.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CR 112
Judge Ruben Castillo

UNITED STATES OF AMERICA,

v.

MICHAEL SEGAL and NEAR NORTH INSURANCE BROKERAGE.

MEMORANDUM ORDER AND OPINION

Defendants Michael Segal and Near North Insurance Brokerage ("NNIB") filed a post- trial motion for a judgment of acquittal, a new trial, and an arrest of judgment. With one exception we deny Defendants' post-trial motion and hold that their convictions were free of any error. We do, however, grant Defendants' motion for a judgment of acquittal with respect to counts sixteen through twenty-two because the Government failed to present any evidence that the insurance license applications that they presented to the Illinois Department of Insurance were "financial reports or documents " as required by 18 U.S.C. § 1033(a)(1). Thus, Defendants' motion is partially granted and partially denied. (R. 380.)

LEGAL STANDARDS

A court must enter a judgment of acquittal under Federal Rule of Criminal Procedure 29 if, after

considering all the evidence in the light most favorable to the Government, it concludes that no rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004). A court can order a new trial under Federal Rule of Criminal Procedure 33 if, after considering the credibility of the witnesses, it concludes that the jury's verdict is "so contrary to the weight of the evidence that a new trial is required in the interest of justice." *See United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). Finally, a court must arrest a judgment under Federal Rule of Criminal Procedure 34 if the indictment does not charge an offense or the court lacks jurisdiction.

ANALYSIS

I. Judgment of Acquittal

Defendants assert that they are entitled to a judgment of acquittal because the Government failed to prove: (1) the scheme to defraud charged in the indictment; (2) an agreement between Segal and Daniel Watkins to defraud the United States; (3) that Defendants were engaged in the "business of insurance;" and (4) that Defendants made a false statement "in connection with any financial reports or documents presented to" the Illinois Department of Insurance. We address each argument in turn.[1]

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[1] We did not address Defendants' argument that the blank license renewal forms were not "sent for the purpose of executing" a scheme to defraud because we fully addressed this issue in an earlier opinion: *United States v. Segal*, 299 F. Supp. 2d 840, 848-50 (N.D. Ill. 2004). We also did not address their claims that we erred in denying various arguments raised in their numerous motions to dismiss. *See* R. 380, Defs.' Mot. at 15-

A. The Scheme to Defraud

Defendants assert that they are entitled to a judgment of acquittal on counts one through fifteen because the Government failed to prove the scheme to defraud charged in the Fourth Superseding Indictment. The Fourth Superseding Indictment charged Defendants with:

> a scheme and artifice to defraud, and to obtain and cause to be obtained the use and benefit of money, funds, credits, and other things of value that [Defendants] misappropriated and misused from a Premium Fund Trust Account ("the Trust") required to be established and honestly and faithfully maintained and accounted for by defendant MICHAEL SEGAL and NNIB for the benefit of customers of NNIB, Insurance Carriers, and others; from money and credits due customers; and from inflated and fraudulently obtained premium payments, all by means of materially false and fraudulent pretenses, representations and promises, and material omissions, by creating the false appearance that premiums paid by customers to NNIB for insurance would be held in trust, properly accounted

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16. With respect to these arguments, we adhere to our previous rulings. *See United States v. Segal*, 248 F. Supp. 2d 786, 790-93 (N.D. Ill. 2003); *Segal*, 299 F. Supp. 2d at 845-50. Additionally, we decline to hold the mail fraud, wire fraud, and RICO statutes unconstitutional.

Defendants also incorporated by reference Defendants' Motion for Judgment of Acquittal, (R. 320), and the Supplemental Memorandum of Law in Support of Defendant Near North Insurance Brokerage, Inc.'s Motion for Judgment of Acquittal, (R. 321). This motion, however, did not raise any arguments not contained in the present motion.

> for and timely transmitted to the appropriate Carriers in payment for the insurance they provided (less any proper deductions such as commissions earned by NNIB); that credits due customers would be held in trust, properly accounted for, and appropriately and timely refunded to customers and otherwise properly treated and accounted for to customers of NNIB, and that proper charges would be billed to and collected from customers; and to deprive the Trust, various Carriers, customers of NNIB, and others, of defendant MICHAEL SEGAL's and defendant NNIB's duty to provide honest services in the operation of NNIB and the maintenance ofNNIB's Premium Fund Trust Account . . . .[2]

(R. 227, Fourth Superseding Indictment, Count 1 ¶ 2.) Rather than prove this scheme to defraud, Defendants assert that the evidence, when viewed in the light most favorable to the Government, could only prove three smaller schemes to defraud: (1) a scheme to defraud NNIB's customers by misusing the PFTA; (2) a scheme to defraud NNIB's customers by writing off credits due to them;[3] and (3) a scheme to

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[2] Before it was submitted to the jury, the Fourth Superseding Indictment was redacted to exclude "the Trust" and "others" as victims.

[3] Defendants actually assert that the evidence could only prove two schemes to defraud because they claim that their second scheme—writing off customers' credits—is conversion, not fraud. (R. 380, Defs.' Mot. at 5.) The Seventh Circuit defines fraudulent conduct as conduct that departs from "fundamental honesty, moral uprightness and candid dealings in the general life of the community." *Henningsen*, 387 F.3d at 589 (quoting *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992)). Deliberately writing off credits that are owed to customers

defraud NNIB's customers by fraudulently obtaining premium payments. Furthermore, Defendants assert they were prejudiced by the variance between the single scheme charged in the indictment and the multiple schemes supported by the evidence.

To be entitled to a judgment of acquittal because of prejudicial variance between the indictment and the evidence, Defendants must prove that: (1) the evidence, when viewed in the light most favorable to the Government, was insufficient to prove the charged scheme to defraud; and (2) they were prejudiced by the variance between the scheme charged in the indictment and the schemes supported by the evidence. *United States v. Williams*, 272 F.3d 845, 862 (7th Cir. 2001); *see also United States v. Polichemi*, 219 F.3d 698, 706 (7th Cir. 2000). Defendants assert that the Government failed to prove the charged scheme to defraud because the evidence showed no connection between the PFTA deficit, the credit write-offs, and the fraudulent premiums. They suggest that the Government should have introduced evidence that Defendants "plotted the injuries at one time or as part of a single 'scheme,'" (R. 380, Defs.'

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qualifies as fraudulent conduct. Defendants' argument that writing off credits is not fraudulent as a matter of law is based on *Richards v. Combined Insurance Company of America*, 55 F.3d 247 (7th Cir. 1995). That case is distinguishable, however, because the Seventh Circuit held that the *Richards* defendants could not have intended to defraud their customers because the evidentiary record showed that they "said that they would return the premium and that they did return premiums." *Richards*, 55 F.3d at 253. The evidentiary record in this case is different; Segal and NNIB did *not* return the premiums. Therefore, this aspect of the scheme was properly submitted to the jury.

Mot at 3), but this type of "smoking gun" evidence is not the only way to prove the charged scheme.

The evidence, viewed in the light most favorable to the Government, was simply overwhelming and more than sufficient to permit a reasonable jury to find the charged scheme to defraud beyond a reasonable doubt. The evidence demonstrated that the credit write-offs and fraudulent premiums brought substantial funds into NNIB, thereby permitting and helping to conceal the continued abuse of the PFTA.[4] Each type of fraudulent conduct furthered and concealed the others, so in this way, these three different types of fraudulent conduct were interrelated and together constituted the charged scheme to defraud. Defendants' three smaller schemes are merely the three principal means through which they carried out the larger charged scheme.[5] We therefore deny Defendants' motion for a judgment of acquittal on this basis.[6]

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[4] In proving that Defendants fraudulently obtained premiums, the Government proved that Defendants used DMI Brokerage, LLC to fraudulently obtain a commission rather than a premium. Defendants concede that this variance was not prejudicial. (R. 460, Defs.' Reply at 4.)

[5] Defendants also claim that the Government failed to prove that their practices of discounting insurance in violation of state law and reimbursing campaign contributions in violation of federal law were parts of the scheme to defraud as alleged in the indictment, (*see* R. 460, Defs.' Reply at 8), but these illegal practices helped conceal the charged scheme from detection by currying favor with influential individuals.

[6] Defendants also assert that they are entitled to a new trial because of the prejudicial variance between the single scheme charged in the indictment and the multiple schemes supported by the evidence. (R. 380, Defs.' Mot. at 44.) They claim that they were prejudiced by this Court's refusal to require special

B. An Agreement to Defraud the United States

Segal asserts that the Government failed to prove an agreement between himself and Watkins to defraud the United States. Segal claims that the only evidence of an agreement was a 1989 memo between himself and Watkins regarding posting withdrawals from petty cash to a postage account. A judgment of acquittal is only warranted when there is "no evidence, regardless of how it is weighed, from which the jury could have found guilt beyond a reasonable doubt." *United States v. Hickok*, 77 F.3d 992, 1002 (7th Cir. 1996) (quoting *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992)). Segal's acknowledgment that there was some evidence of an agreement to defraud the United States precludes granting him a judgment of acquittal.

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verdicts on each of Defendants' smaller schemes to defraud. The indictment did not allege these three schemes, and the evidence—even when considering the credibility of the witnesses—was sufficient for a jury to find the charged scheme to defraud. Accordingly, Defendants were not entitled to the requested special verdicts. Defendants also claim that they were prejudiced because the indictment returned by the grand jury incorrectly referred to the PFTA as a victim. This Court redacted those references from the indictment before submitting the charge to the jury, yet Defendants seek a new trial because "it is not clear that the grand jury would have returned an indictment without reference to the PFTA as a victim." (*Id.*) We fail to comprehend how this small change to the indictment could have had such a significant effect on a grand jury, and even if we could, the requested relief—a new trial—would not be the appropriate remedy as Defendants claim that the indictment was defective. We therefore reject both of Defendants' "prejudicial variance" arguments in support of their motion for a new trial.

The Government, however, also introduced a considerable amount of circumstantial evidence to establish that Segal and Watkins agreed to defraud the United States: testimony from numerous witnesses that Watkins was solely responsible for Segal's accounting; that Watkins regularly delivered cash to Segal; and that Watkins paid for Segal's personal expenses with corporate money. This evidence was more than sufficient for a rational jury to conclude that Watkins and Segal "embraced the criminal objective" of defrauding the United States through the filing of false tax returns. *See United States v. Messino*, 382 F.3d 704, 709 (7th Cir. 2004). The Government does not need to introduce evidence proving an "explicit agreement;" they only need to prove the existence of a "tacit agreement." *Id.* We, therefore, deny Segal's motion for a judgment of acquittal on this basis.

C. The Business of Insurance

Defendants assert that the Government failed to prove that they were engaged in the "business of insurance" as defined in 18 U.S.C. § 1033(f)(1). That section defines "business of insurance" as:

> (A) the writing of insurance, or
>
> (B) the reinsuring of risks,
>
> by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons . . . .[7]

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[7] The statute further defines the term "insurer" as "any entity the business activity of which is the writing of insurance or the

18 U.S.C. § 1033(f)(1). Defendants assert that they were not in the business of insurance because, as insurance brokers, they never wrote insurance nor reinsured risks. The evidence at trial, viewed in the light most favorable to the Government, was sufficient for a reasonable jury to find that Defendants, as brokers, were agents of the insurance carriers.[8] Defendants were therefore engaged in the business of insurance as defined in the statute, so we deny their motion for a judgment of acquittal on this basis.

D. Financial Reports or Documents

Counts sixteen through twenty-two of the Fourth Superseding Indictment allege that Defendants violated 18 U.S.C. § 1033(a)(1) by making false statements in insurance producer license renewal applications that they submitted to the Illinois Department of Insurance. Section 1033(a)(1) provides that:

> [w]hoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security—
>
> (A) in connection with any financial reports or documents presented to any insurance reg-

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reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business . . . ." 18 U.S.C. § 1033(f)(2).

[8] Brokers have the authority to act on behalf of insurance carriers. Indeed, Defendants acknowledge that under Illinois law "once insurance is bound through a broker like Near North, the insured customer is covered whether the broker forwards the premium to the carrier or not." (R. 380, Defs.' Mot. at 25.)

> ulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and
>
> (B) for the purpose of influencing the actions of such official or agency or such an appointed agent or examiner, shall be punished as provided in paragraph (2).

In a pre-trial motion to dismiss, Defendants requested that we dismiss these counts because the license renewal applications were not financial reports or documents. We denied their motion to dismiss in order to afford "the Government the opportunity to prove that Defendants made a false statement in connection with a financial report or document that was presented to an insurance regulator." *Segal*, 299 F. Supp. 2d at 848.

The Government failed to present any evidence that the license renewal applications were financial reports or documents. The Government asserts that § 1033(a)(1) only requires that Defendants made a false statement "in connection with" the PFTA's financial records.[9] This interpretation ignores

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[9] During the trial the Government asserted that the license applications should be considered financial documents. (R. 380, Defs.' Mot. at 9, citing Trial Transcript at 5117.) The Government has not made this argument in its post-trial brief, nor has the Government presented any evidence that would lead this Court or a rational jury to conclude that these license applications should be treated as financial documents. Furthermore, at the time the statute was enacted, one congressman, Representative Earl Pomeroy of North Dakota, noted that the inclusion of the word "financial" decriminalizes false statements in license applications because they are not "explicitly 'financial' in nature, but are nevertheless extremely important to effective insurance regulation." 140 Cong. Rec. E748-01 (daily ed. Apr. 21, 1994) (statement of Rep. Pomeroy).

§ 1033(a)(1)(A)'s "presented to" clause which limits the statute to false statements made "in connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person . . . ." This Court must give meaning to "every clause and word in a statute," so we reject the Government's interpretation because it deprives the "presented to" clause of any meaning.[10] *See Matter of Lufshultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) (quoting *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)).

Given the complete absence of evidence establishing that the license renewal applications were financial reports or documents, we conclude that no rational jury could have found that Defendants made a false statement "in connection with any financial reports or documents presented" to the Illinois Department of Insurance. Furthermore, no testimony established that the license renewal applications had any potential influence on any state official. Accordingly, the jury's guilty verdict with respect to counts sixteen through twenty-two is not supported by the evidence. We therefore grant Defendants' motion for a judgment of acquittal with respect to these counts.

II. New Trial

Defendants assert that they are entitled to a new trial because this Court made a multitude of errors

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[10] We also find that the term "financial" modifies both reports and documents. *See Home Life Ins. Co. v. Dunn*, 86 U.S. 214, 224 (1873).

before and during the trial.[11] They assert that: (1) this Court made numerous evidentiary errors; (2) this Court improperly denied Defendants' motions for a mistrial; (3) this Court erred in instructing the jury; (4) this Court erred in permitting the Government to monitor defense inspection of documents; and (5) this Court erred during the forfeiture proceeding by preventing Segal from offering cost-of-capital evidence and by modifying a jury instruction after Segal's closing argument. They also claim that the totality of circumstances surrounding this prosecution requires a new trial. We address and reject each of these arguments in turn.

A. Evidentiary Rulings

A defendant is entitled to a new trial because of an erroneous evidentiary ruling if the error had a "substantial and injurious effect or influence on the jury's verdict." *United States v. Redditt*, 381 F.3d 597, 601 (7th Cir. 2004) (quoting *United States v. Woods*, 301 F.3d 556, 562 (7th Cir. 2002)). If the properly admitted evidence of the defendant's guilt is overwhelming, an evidentiary error is deemed harmless

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[11] We decline to address the following arguments because we have adequately addressed them elsewhere: (1) this Court admitted inadmissible "other acts" evidence, (R. 239, March 23, 2004 Minute Order); (2) this Court erred in denying Defendants' motions for an evidentiary hearing, *United States v. Segal*, 299 F. Supp. 2d 856 (N.D. Ill. 2004); (3) this Court erred in not excluding the fruits of the Government's review of Defendants' attorney-client privileged communications, *United States v. Segal*, 313 F. Supp. 2d 774 (N.D. Ill. 2004); (4) this Court erred in denying Defendants' renewed motions for a bill of particulars, *Segal*, 299 F. Supp. 2d at 851; and (5) there is insufficient evidence to support the jury's finding that $30 million is subject to forfeiture, *United States v. Segal*, 339 F. Supp. 2d 1039, 1048-49 (N.D. Ill. 2004).

and cannot constitute the basis for a new trial. *Id.* Defendants assert that they are entitled to a new trial because this Court admitted inadmissible evidence and excluded admissible evidence.

1. The Admission of Inadmissable Evidence

Defendants assert that this Court admitting a substantial amount of inadmissible evidence: (1) hearsay testimony from NNIB's employees and outside consultants; (2) inadmissible legal opinions; (3) hearsay testimony and speculation from Nathaniel Shapo; and (4) irrelevant evidence or evidence that should have been excluded under Federal Rule of Evidence 403.[12] We address each category in turn.

a. The Testimony of the Co-Conspirators

Defendants assert that this Court erred in admitted hearsay evidence from NNIB's employees and from NNIB's outside consultants. The Government asserts that these statements are admissible under Federal Rules of Evidence 801(d)(2)(E). This rule provides that a statement offered against a party is not hearsay when it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). A statement is admissible under Rule 801(d)(2)(E) if the Government demonstrates "by a

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[12] Defendants also assert that we should have barred the Government from arguing that Defendants' abuse of the PFTA placed a risk of loss on consumers. They assert that under Illinois law the customer is afforded coverage from the carrier even if the broker does not pay the customer's premiums. We remain unconvinced that this state law provision eliminated the possibility that one of NNIB's customers would suffer a loss as a result of Defendants' abuse of the PFTA. This evidence was relevant and properly admitted.

preponderance of the evidence that: (1) a conspiracy existed; (2) defendant and declarant were involved in the conspiracy; and (3) the statements were made during and in furtherance of the conspiracy." *United States v. Haynie*, 179 F.3d 1048, 1050 (7th Cir. 1999).

This Court conditionally admitted these statements after reviewing the Government's *Santiago* proffer and admitted them into evidence during trial after concluding that the Government had met its burden of proof. While Defendants assert that the Government failed to satisfy this burden, we adhere to our trial ruling because the Government presented evidence—which amply satisfied the preponderance standard—demonstrating that Defendants and the declarants conspired to defraud their customers—either by abusing and covering up the abuse of the PFTA deficit, writing off credits, or obtaining improper premiums—and that the admitted statements were made during and in furtherance of the conspiracy. This evidence was properly admitted.

b. Legal Opinions

A non-expert witness, under Federal Rule of Evidence 701, can give his personal opinion if it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [*i.e.* expert testimony]." Defendants assert that this Court erroneously admitted the following three opinions: (1) Norm Pater's opinions about Illinois's PFTA regulations and Ponzi schemes; (2) Marie Heinrich's opinion about whether Illinois law permitted NNIB to give insurance discounts or rebates

to customers;[13] and (3) Pat Morgan's opinion that Segal's lack of records impeded her ability to perform necessary tax calculations. Each of these opinions meets the three Rule 701 criteria, so they were properly admitted. Even if these opinions were not admissible under Rule 701, this error would be harmless given the overwhelming evidence of Defendants' guilt. *See Redditt*, 381 F.3d at 601.

c. The Testimony of Nathaniel Shapo

Defendants assert that this Court erred in admitting hearsay evidence and speculation through the witness Nathaniel Shapo. Shapo testified about two phone conversations he had with former Governor George Ryan and speculated as to the reasons Governor Ryan placed those calls. These statements were admissible not for the truth of the matters

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[13] Defendants also assert that there was no basis for the Government to assert that they violated 215 Ill. Comp. Stat. 5/151(1) because the Government offered no evidence that a "customer was induced to purchase insurance as a consequence of receiving a discount." (R. 380, Defs.' Mot. at 6.) The statute does not require that a discount induce a customer to purchase insurance, rather it prohibits giving:

> any rebate of or part of the premium payable on the policy, or on any policy or agent's commission thereon or earnings, profits, dividends or other benefits founded, arising, accruing or to accrue thereon or therefrom, or any special advantage in date of policy or age of issue, or any paid employment or contract for services of any kind or any valuable consideration or inducement to or for insurance on any risk . . . . 215 Ill. Comp. Stat. 5/151(1). This statute prohibits both giving "any rebate of or part of the premium payable on the policy" and giving "any other valuable consideration or inducement to or for insurance on any risk." Moreover, it is disingenuous for Defendants to claim that a rebate is not an inducement to purchase insurance.

asserted in those conversations, but to properly explain Shapo's actions. Even if this Court erred in admitting Governor Ryan's statements for the truth of the matter—that he was attempting to convince Shapo to give NNIB favorable treatment—any prejudicial effect that these statements could have had was minimal because the fact that former Governor Ryan twice called Shapo was admissible as was Shapo's conversation with Defendants' agent Zach Stamp. Shapo could also provide his personal opinion under Rule 701 as to why Governor Ryan called him. *See* discussion of Rule 701, page 11 *supra*. Thus, this Court properly admitted Shapo's testimony, and any possible error in this regard would be harmless given the overwhelming evidence of Defendants' guilt. *See Redditt*, 381 F.3d at 601.

d. Irrelevant and Unfairly Prejudicial Evidence

Defendants assert that this Court admitted irrelevant evidence or evidence which should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Defendants assert that evidence that they reimbursed employees' political contributions, gave loans or paid consulting fees to politicians and former politicians, and gave its customers discounted insurance was irrelevant. We disagree. This evidence was relevant because these practices helped to conceal the scheme by currying favor with influential individuals. This evidence was also admissible under Rule 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. This Court properly admitted this evidence, and any possible error in this regard would be harmless given the overwhelming evidence of Defendants' guilt. *See Redditt*, 381 F.3d at 601.

Defendants also assert that this Court improperly admitted several large photographs of cash and other items observed by FBI agents in Segal's downtown condominium. These photographs were relevant because they made it more probable that Segal received substantial amounts of cash from Daniel Watkins and others. Segal's offer to stipulate to the amount of money the FBI found at his residence does not affect the relevance of the photographs. While a stipulation might have mitigated the danger of unfair prejudice, this danger did not substantially outweigh the photographs' probative value. This Court properly admitted this evidence, and any possible error in this regard would be harmless given the overwhelming evidence of Defendants' guilt. *See Redditt*, 381 F.3d at 601.

2. The Exclusion of Admissible Evidence

Defendants assert that this Court improperly excluded the following admissible evidence: (1) evidence of the collateral impact and financial devastation suffered by NNIB as a result of the criminal prosecution; and (2) the unredacted version of Government Exhibit 38. Defendants assert that evidence of the financial devastation suffered by NNIB was relevant to show the bias of certain cooperating witnesses, who according to the defense, vindictively engineered Defendants' prosecution. Whatever minute tendency this evidence may have had to make Defendants' theory more probable was substantially outweighed by the evidence's ability to inappropriately elicit the jury's sympathy. Accordingly, this evidence was properly excluded under Rule 403.

Defendants next assert that the unredacted version of Government Exhibit 38 should have been admitted. This exhibit is a memo drafted by Deloitte &

Touche auditor Heidi Morlock about Defendant's use of fiduciary funds for operating purposes. This Court redacted the memo to exclude hearsay statements made by an insurance expert and NNIB's outside counsel. Defendants assert that the redacted statements are admissible as hearsay under Federal Rule of Evidence 803(6) because "it is the regular activity for outside auditors to gather information from third parties." (R. 380, Defs.' Mot. at 34.) Defendants, however, did not establish that the third parties' statements were records of regularly conducted activity, so they cannot rely on Rule 803(6) to introduce hearsay inside of a hearsay document. We properly redacted Government Exhibit 38 to exclude the inadmissible hearsay.

After considering all of Defendants' challenges to our evidentiary rulings we conclude that even if, as noted above, some of our rulings were erroneous that these errors were harmless. Given the overwhelming, properly-admitted evidence of Defendants' guilt, these handful of arguable errors could not have had a "substantial and injurious effect or influence on the jury's verdict." *Redditt*, 381 F.3d at 601. Our evidentiary rulings, therefore, are not a valid basis for a new trial.

B. Mistrial Motions

A defendant is entitled to a new trial if this Court erroneously denied a motion for a mistrial. A mistrial would be warranted if a prosecutor made a statement that, when viewed in isolation, was improper and, when viewed in the context of the entire trial, deprived the defendant of his right to a fair trial. *United States v. Mabrook*, 301 F.3d 503, 509 (7th Cir. 2002). Defendants moved for a mistrial on two occasions: after the Government asked a witness if

she was aware that Dan Rostenkowski was convicted for stealing money from a postage fund, (*see* Trial Transcript at 1964-65), and after the Government stated in closing argument that Segal hired Harvey Silets, "one of the best criminal defense lawyers in the city," after he discovered that his scheme to defraud might be exposed, (*see* Trial Transcript at 5784-85). This Court denied both motions and gave the jury appropriate limiting instructions.

Both of these statements—when viewed in isolation—were improper, so the question is whether either of them deprived Defendants of their right to a fair trial. To determine this, we consider: "(1) the nature and seriousness of the statements, (2) whether the defendant's conduct invited the statements, (3) whether the district court adequately instructed the jury, (4) whether the defendant had the opportunity to counter the statements, and (5) the weight of the evidence against the defendant." *Mabrook*, 301 F.3d at 509. The Rostenkowski statement did not deprive Defendants of their right to a fair trial. This one question asked in the middle of a two month trial could not have had a serious effect on the jury's verdict. The Court adequately instructed the jury to disregard it and even issued a curative instruction. Furthermore, the evidence of Defendants' guilt was overwhelming. The Silets statement also did not deprive Defendants of their right to a fair trial. It is improper for a prosecutor to imply that a defendant is guilty because he hired a criminal defense lawyer, but one such mis-step during a lengthy closing argument does not require a new trial. The jury was instructed that the attorneys' statements during closing arguments are not evidence, Defendants' timely objection to the statement was sustained, and the evidence of Defendants' guilt

was overwhelming. For these reasons, we properly denied Defendants' motions for a mistrial.

C. Jury Instructions

A defendant is entitled to a new trial if he was prejudiced by jury instructions that did not adequately state the law. *Boyd v. Ill. State Police*, 384 F.3d 888, 894 (7th Cir. 2004). A defendant is prejudiced if, after considering all the instructions, evidence, and arguments, "the jury was misinformed about the applicable law." *Id.* (quoting *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001)). Defendants assert that they are entitled to a new trial because this Court refused to instruct the jury that it could consider an absence of loss as proof that they had no intent to defraud and refused to instruct the jury that the intent to violate state law does not equal the intent to commit mail fraud.[14]

This Court's refusal to instruct the jury that it could consider an absence of loss as proof that Defendants had no intent to defraud did not misinform the jury about the applicable law. Defendants claim that, in light of the numerous legally-correct instructions stating that no proof of loss is required,

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[14] Defendants also assert that this Court erred by refusing to give Defendants' proposed instruction that a multiplicity of mailings may not establish a "pattern" of racketeering activity and by giving the *Hausmann* instruction. *See United States v. Hausmann*, 345 F.3d 952 (7th Cir. 2003). Defendants have not explained why they were prejudiced by this Court's refusal to give Defendants' proposed instruction that a multiplicity of mailings may not establish a "pattern" of racketeering activity, and they concede that the *Hausmann* instruction is established Seventh Circuit law. For these reasons alone, we deny these arguments.

the jury should have also been instructed that evidence of no loss may prove that they lacked an intent to defraud. The absence of this instruction did not misinform the jury about the applicable law. Defendants elicited testimony from numerous witnesses that NNIB paid all premiums owed to insurance carriers, and the jury was explicitly instructed that it should consider all the evidence in the case. (R. 331, Jury Instructions at 7.) Moreover, Defendants highlighted this evidence in their closing arguments. The Court was under no obligation to do so again in the jury instructions. Thus, this Court's refusal to instruct the jury in this manner, considering the trial as a whole, did not misinform the jury.

This Court's refusal to instruct the jury that the intent to violate state law does not equal the intent to commit mail fraud also did not misinform the jury about the applicable law. This Court instructed the jury that Defendants were charged with violations of federal law, not state law, and that the jury should not find Defendants guilty unless the Government proved all the elements of the charged federal crimes beyond a reasonable doubt. (*Id.* at 61.) This instruction adequately stated the law, so this Court's refusal to use Defendants' language did not misinform the jury. Thus, we deny Defendants' motion for a new trial on this basis.

D. Monitoring of Defense Inspection of Documents

Defendants claim that this Court erred by permitting the Government to monitor their inspection of documents in the Government's possession. The Government stored documents it seized from NNIB in an off-site storage facility and monitored Defendants' inspection of these documents. More than two

years after the documents were seized and in the midst of the trial, Defendants requested that this Court bar this practice asserting that it violates the work-product doctrine and their Sixth Amendment right to counsel. (R. 291, Defs.' Mot.) We denied their motion finding nothing "inappropriate" about the practice. (Trial Transcript at 2529.) Defendants cited no analogous cases and have provided no new arguments. We therefore adhere to our trial ruling and find that Defendants are not entitled to a new trial on this basis.

E. Forfeiture Proceedings

Segal also contends that he is entitled to a new forfeiture trial because this Court made two errors during this proceeding by: (1) ruling that cost-of-capital evidence was not relevant; and (2) modifying a jury instruction after Segal had made his closing argument. First, Segal sought to introduce evidence of the interest NNIB would have paid had it borrowed money in lieu of misappropriating money from the PFTA. This Court ruled that the evidence was not relevant because the amount of interest NNIB would have owed under this hypothetical scenario is not relevant to the calculation of his actual racketeering proceeds. Segal asserts that the cost-of-capital evidence was a "reasonable alternative" because he ultimately eliminated the PFTA deficit. (R. 380, Defs.' Mot. at 37.) He also claims that the Government conceded the relevancy of this evidence by arguing that the "rate-of-return" on the misappropriated PFTA money is forfeitable. (*Id.* at 38.) Yet these arguments do not address how evidence of events that never happened—the use of loans to expand NNIB is relevant to Segal's racket-

eering proceeds. This Court properly excluded this evidence.

Next, Segal asserts that a new forfeiture trial is required because this Court modified a jury instruction after Segal's closing argument. At the time that Segal made his closing argument, the instruction was:

> Only those proceeds received by the defendant can be subject to forfeiture. Income, revenue, proceeds received by the enterprise, but not by the defendant, are not subject to forfeiture pursuant to subsections (a)(1) and (a)(3).

(R. 380, Defs.' Mot. at 39, citing Trial Transcript at 6069.) After Segal's closing argument, this Court inserted the clause "directly or indirectly" into the first sentence of the instruction so that it read: Only those proceeds received by the defendant directly or indirectly can be subject to forfeiture. (R. 339, Forfeiture Jury Instructions at 10.) Segal claims that he was prejudiced by this alteration because he based his argument on the original instruction. The modified instruction, however, conforms with the statutory language of 18 U.S.C. § 1963(a)(3). To the extent Segal made an argument that was not based on the law, he did so at his peril. And if he wanted to clarify his closing argument in light of this modification, he should have requested leave to reopen his closing argument. Segal was not prejudiced by the modification, and the jury was not misinformed about the applicable law. Thus, there is no need for a new forfeiture trial.

F. Totality of the Circumstances

Defendants' final argument is that the totality of the circumstances warrant a new trial. As we have

found little merit among the dozens of arguments that Defendants have raised in their motion for a new trial, we easily conclude that Defendants were afforded a fair trial that respected all of their constitutional rights. Therefore, the totality of the circumstances do not require a new trial.

III. Arrest of Judgment

This Court "must arrest judgment if: (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense." Fed. R. Crim. P. 34. Defendants assert that the same reasons which justify granting them a new trial and a judgment of acquittal warrant arresting the judgment against them. This argument, which categorically ignores the appropriate legal standard for arresting a judgment, is denied just as cursorily as it was made.

CONCLUSION

Defendants' motion for a judgment of acquittal is only granted with respect to counts sixteen through twenty-two of the Fourth Superseding Indictment. The jury's verdict with respect to these counts was not supported by the evidence because the Government failed to present any evidence that the insurance producer renewal licenses presented to the Illinois Department of Insurance were "financial reports or documents" as required by 18 U.S.C. 1033(a)(1). Defendants' motion for a judgment of acquittal, a new trial, and an arrest of judgment is otherwise denied. (R. 380.) The bottom line is that both Defendants were properly convicted of most of the charges against them after a fair trial by a competent, properly instructed jury that was presented with overwhelming evidence of Defendants' guilt.

This Court plans to proceed with sentencing of both Defendants on February 23, 2005 at 1:00 pm.

ENTERED: _____

Judge Ruben Castillo
United States District Court

Dated: December 13, 2004